No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Reply Brief for Appellant Farmers Insurance Exchange

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RESPONSE TO APPELLEES' STATEMENT OF THE CASE

Appellees' "Statement of the Case" is a five page narrative statement which fails to set forth or discuss facts relating to the sole question to be resolved on this appeal: whether an automobile liability insurance carrier, under the laws of the State of Arizona, is deprived of a policy defense of fraud and deprived of such defense to the full extent of the policy limits.

Rather than discussing such matters, appellees describe a series of admittedly disputed factual questions and a series of facts which relate to issues which were not considered by

the District Court because of its conclusion that no policy defense was available to appellant as a matter of law. If the District Court erred in this conclusion, then obviously this case must be returned to the District Court so it can decide the disputed fact questions and hear the evidence concerning and rule on the legal significance of the other defenses which appellees have advanced in response to appellant's claim in this action.

RESPONSE TO APPELLEES' CONTENTIONS AND ARGUMENTS IN SUPPORT THEREOF REGARDING APPELLANT'S "SPECIFICATIONS OF ERROR"

As appellees state, appellant has paid a total of Twenty Thousand Dollars ($20,000.00) as a result of the subject accident. Of this amount, $10,000.00 has been paid to Mrs. Rose and $8,250.00 has been paid to Mr. Rose. Appellant agrees that the question as to whether it was obliged to pay said sums is moot. However, the question as to whether appellant's policy "became absolute" as to the appellees upon the occurrence of the accident, as is set forth in the judgment, is a necessary issue to be resolved on this appeal.

Appellees have refused to discuss the sole issue in this lawsuit. They simply cite *Sandoval v. Chenoweth,* 428 P.2d 98, and stand silently and hopefully. Aside from citing *Sandoval,* which they never discuss, and citing *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136 (1963), *Jenkins v. Mayflower,* 93 Ariz. 287, 380 P.2d 145 (1963), and *Pacific Indemnity Co. v. Hamman Wholesale Lumber and Supply Co., Inc.,* 95 Ariz. 362, 390 P.2d 897 (1964), as authority for the proposition that all policy defenses are abolished up to the required minimum amounts, the only case cited is *State Farm Mutual Automobile Ins. Co. v. Thompson,* 372 F.2d 256 (9th Cir. 1967).

In that case there was a judgment against the alleged insured for $32,658.50. The company denied coverage, claiming the defendant was not an additional insured. This court affirmed the ruling of the District Court that the defendant was not an additional insured. The policy was a $10,000.00/$20,000.00 policy. The insurance company was sued for $10,158.50. The District Court granted plaintiff's motion for summary judgment and entered judgment for the plaintiff in the sum of $5,000.00 plus interest. In awarding a judgment for $5,000.00 instead of the policy limit of $10,000.00 the District Court accepted the company's view that if the defense of noncooperation is precluded by A. R. S. § 28-117OF, it was precluded only as to the first $5,000.00 of the policy of insurance which was the minimum amount of coverage required by the Arizona Financial Responsibility Law. This court affirmed that decision. This case supports appellant's position and is of no comfort to appellees.

Appellees' brief is primarily striking in that it fails to discuss what appellant has argued, the real issues before this court in this case. Specifically, it does not discuss (1) the fact that we have a statute in this case (A. R. S. § 20-1109) which the Arizona Supreme Court was not concerned with in any other cases it has decided in this area of the law, (2) the significance of the language we have in the policy before the court in this case, which language was not before the Arizona Supreme Court in any of the cases decided by it, and (3) the fact that the policy considerations at play in a fraud case differ substantially from those at play in the usual case. Appellant has already stated its position on these matters in depth. It would serve no useful purpose to repeat here what we have said on these points in our opening brief.

CONCLUSION

We can only state by way of conclusion what we stated in our opening brief. The District Court erred. It ruled as it did because of its interpretation of one case, *Sandoval v. Chenoweth*. The court failed to take into account the basis for the *Sandoval* decision and the substantial and decisive distinctions between the facts of that case and the facts of this case. The error is clear and the judgment below produced a clearly inequitable result. It should be reversed.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. O'CONNOR III